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FILED UNDER SEAL

February 9, 2006

BY HAND DELIVERY

The Honorable Gregory M. Sleet
 United States District Court
 844 North King Street
 Wilmington, DE 19801

Re: Ventana Medical Systems, Inc. v. DakoCytomation Corp.
C.A. No. 04-1522-GMS

Dear Judge Sleet:

Pursuant to the Court's scheduling order of March 31, 2005, I write to request permission for plaintiff Ventana Medical Systems, Inc. to file a motion for partial summary judgment regarding the issue of infringement. As explained below, Ventana believes that this motion will substantially streamline the issues to be presented at trial in this case.

Ventana asserts infringement of claims 1, 2, 3 and 45 of the '901 patent. Claims 1 and 45 are independent claims that each have five elements. For purposes of infringement, the elements of claims 1 and 45 are substantially the same. They are: (a) a reagent carousel having a plurality of reagent container supports; (b) a homing and indexing device, (c) a motor engaging the reagent carousel, (d) a sample carousel, and (e) an air mixer.

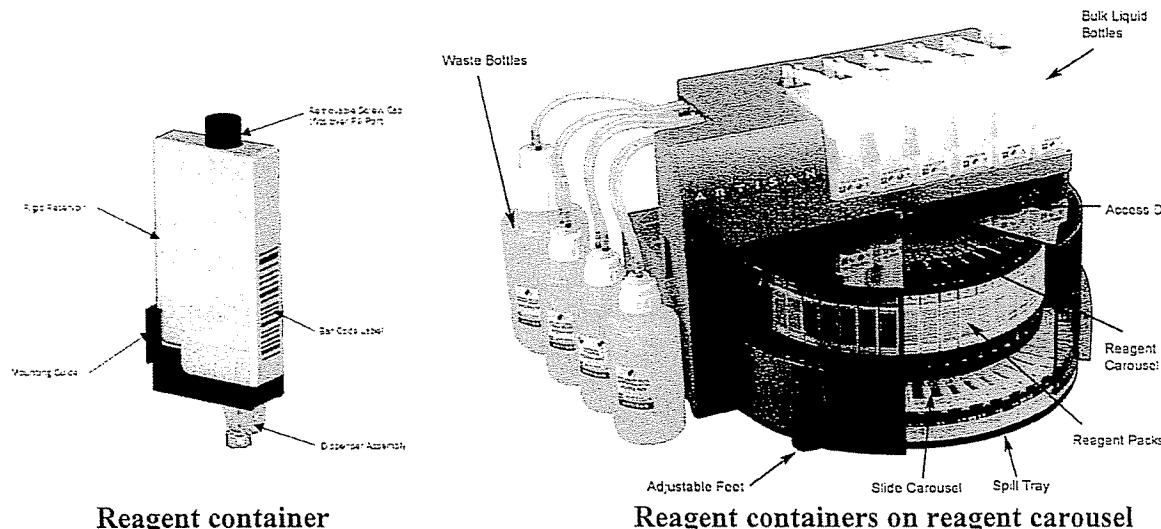
The parties have completed fact discovery relating to liability issues. Disputed language in the claims has been construed. Both parties have set forth their respective positions on infringement. Ventana's interrogatory responses were accompanied by a 12-page claim chart

YOUNG CONAWAY STARGATT & TAYLOR, LLP
 The Honorable Gregory M. Sleet
 February 9, 2006
 Page 2

that detailed the evidence of infringement and specified where each element of claims 1, 2, 3 and 45 is found in the accused Artisan device. Two and a half weeks after service of those responses, DakoCytomation supplemented its interrogatory responses and identified only elements (a) and (e) from claims 1 and 45 as allegedly missing from the Artisan device.

The parties' contention interrogatory responses confirm that there is no dispute that the Artisan device meets the preamble and elements (b), (c) and (d) of claims 1 and 45, as well as the additional elements of dependent claims 2 and 3. Partial summary judgment on these undisputed issues would significantly streamline the infringement issues to be presented at trial.

With respect to the remaining elements (a) and (e) of claims 1 and 45, DakoCytomation sets forth only three noninfringement arguments. Two are amenable to summary judgment. DakoCytomation asserts that element (a) is not met because its reagent carousel does not have a "plurality" of reagent container supports. This issue can be resolved on summary judgment because the structure of the Artisan device is not disputed. According to DakoCytomation's own technical documentation, each Artisan device has a reagent carousel that can hold up to 50 reagent containers. The documentation refers to these containers as "reagent packs." The reagent containers on the reagent carousel are shown below:



Each reagent container can be inserted into one of the corresponding reagent container slots located on the reagent carousel, and therefore, each has its own reagent container support. This Court can decide on summary judgment whether 50 separate slots for 50 separate reagent containers constitute a "plurality" of reagent container supports.¹

¹ DakoCytomation does not dispute that its reagent carousel has 50 slots, each of which can support a corresponding reagent container. Instead, it contends that it only has a single reagent container support because the "Artisan has one contiguous ring that supports all the reagent

YOUNG CONAWAY STARGATT & TAYLOR, LLP
The Honorable Gregory M. Sleet
February 9, 2006
Page 3

DakoCytomation also asserts that element (e) is not met because the Artisan does not have a nozzle. (The “air supply means” of element (e) includes a “nozzle.” *See* D.I. 56 ¶ 4.) This, too, can be resolved on summary judgment, because DakoCytomation’s own technical documentation confirms that the Artisan device uses a nozzle to supply air:

Should the foregoing infringement related disputes be resolved on summary judgment, any remaining issue of infringement can be presented at trial with greater efficiency and less confusion to the jury.

Respectfully yours,



Richard H. Morse (I.D. No. 531)

RHM:mmeeh

cc: Clerk of the Court (By E-filing and Hand Delivery)
Timothy Devlin, Esquire, Esquire (By E-filing and Hand Delivery)
Michael E. Zeliger, Esquire (By E-mail and Federal Express)

containers.” This argument – that there cannot be a “plurality” of supports if they are “contiguous” – is at odds with the specification of the ‘901 patent, which shows 25 contiguous reagent container supports within one reagent carousel. DakoCytomation’s attempt to apply this strained claim construction can be resolved as a matter of law.